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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 710

JOHN C. PALMER by JEAN M. PALMER, his guardian ad litem, *Petitioner,*

vs.

WATERMAN STEAMSHIP CORPORATION, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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THE ARGUS PRESS, SEATTLE

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OCTOBER TERM, 1958

JOHN C. PALMER by JEAN M. PALMER, his guardian ad litem, *Petitioner*,

vs.

WATERMAN STEAMSHIP CORPORATION, a corporation, *Respondent*.

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

To the Honorable, The Supreme Court of the United States:

John C. Palmer, by Jean M. Palmer, his guardian ad litem, prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Washington, which judgment affirmed the judgment of the Superior Court of the State of Washington which entered judgment in favor of the respondent upon the verdict of the jury.

OPINIONS OF THE COURTS BELOW

Judgment of the Superior Court of the State of Washington in favor of the respondent was entered on the 7th day of May, 1957. This being a court of first impression, the judgment is not reported. The judgment is appended hereto (Appendix A, p. 15).

Upon appeal to the Supreme Court of the State of Washington that court affirmed the judgment. The opinion of the Supreme Court of the State of Wash-

ington was filed July 17, 1958, and reported 152 Wash. Dec. 533; 328 P.(2d) 169 (Appended hereto. Appendix B, p. 17).

Petitioner's petition for rehearing in the Supreme Court of the State of Washington was denied by order filed December 10, 1958. Such order denying petition for rehearing was reported in 153 Wash. Dec. 246, ... P. (2d) ..... (Appended hereto, Appendix C, p. 22).

JURISDICTION

1. The judgment and decree of the Supreme Court of the State of Washington, sought to be reviewed herein, was dated July 17, 1958, and was entered on the same date.

2. After filing of the original opinion and judgment in the Supreme Court of the State of Washington, a petition for rehearing was filed on the 12th day of August, 1958. On the 10th day of December, 1958, an order was filed by the Supreme Court of the State of Washington denying the petition for rehearing. Appended hereto (Appendix C, p. 22).

3. Jurisdiction of this court is sustained by the Act of June 25, 1948, C. 646, P. 1, 62 Stat. 929, now 28 U.S.C.A. §1257(3) and 62 Stat. 963, now 28 U.S.C.A. §2106.

4. This petition is timely filed within ninety days from the 10th day of December, 1958, the date upon which petitioner's application for rehearing was denied by the Supreme Court of the State of Washington.[1]

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[1] Act of June 25, 1948, C. 646, P. 1, 62 Stat. 961, as amended May 24, 1949, C. 139, P. 106, 63 Stat. 104, 28 U.S.C.A. §2101(c).

QUESTIONS FOR REVIEW

1. Is intoxication of a merchant seaman to such a degree that the seaman is unable to care for himself, an illness which imposes on the other crew members a duty to use reasonable care to assist the helpless intoxicated seaman to a place of safety?

2. Is there a duty as a matter of law requiring a vessel owner to assist a crew member to a place of safety when he is found on the deck of the vessel in a helpless intoxicated condition?

3. When a ship's officer and a fellow crewman are assisting a helpless intoxicated seaman from the deck to his quarters are they in the performance of a duty owed by the vessel to the seaman?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The constitutional provision applicable to the instant matter is Article III, Sec. 2, Clause 1:

> "The judicial Power shall extend to all cases * * * of admiralty and maritime jurisdiction; * * * ".

The statutes involved are the Jones Act,[2] reading in part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * * ."[3]

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[2] Act of June 5, 1920, C. 250, 41 Stat. 1007, 46 U.S.C.A. §683, *et seq.*

[3] 46 U.S.C.A. §688.

and the Federal Employers Liability Act,[4] reading in part as follows:

> "Every common carrier by railway while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of death of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * equipment * * *."[5]

STATEMENT OF THE CASE

John C. Palmer, by his guardian ad litem, Jean M. Palmer, sued his employer, the Waterman Steamship Corporation, to recover damages for injuries which he sustained on August 22, 1955, on board the SS "JOHN B. WATERMAN" then alongside of the dock in Seattle, Washington.

About 3:05 A.M. on the above date Palmer, an oiler on the vessel, was seen on the deck of the vessel near No. 4 hold by Wood, the second assistant engineer. Palmer was apparently intoxicated and Wood went over to see if he needed any help. Shortly thereafter Koski, another crew member, joined Wood to assist him. Koski testified he did not believe Palmer could walk by himself (R. 46, Dep. p. 15), and he was trying to get Palmer back to his quarters because of the danger of Palmer getting hurt (R. 46, Dep. p. 20). Peterson, the gangway watchman on the vessel, observed Koski and Wood try-

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[4] Act of April 22, 1908, C. 149, 35 Stat. 65, 45 U.S.C.A., §51, *et seq.*

[5] 45 U.S.C.A. §51.

ing to pick up Palmer, who was then in a prone position, flat on his back apparently "passed out" with his eyes completely closed (R. 44, Dep. pp. 11-12).

Wood and Koski each took hold of an arm and helped Palmer back, walking on the port side of the vessel to a small house on the after end of the vessel which contained the entrance of the passageway which led to the stairway into the crew's quarters on the deck below. Because of the narrow width of this passageway, Koski went in first, followed by Palmer and then Wood. While in the passageway, Palmer supported himself by holding onto the side as they approached the top of the stairway (R. 46, Koski Dep. p. 15).

When they came to the top of the stairway, Koski became disgusted (Koski Dep. p. 27) with Palmer and went on down the stairway, leaving Palmer and Wood at the top (R. 45, Koski Dep. p. 10)). Wood watched Palmer take a couple of steps down the ladder alone and then Wood turned and started back in the passageway to his own quarters on the main deck (R. 47, St. 356). Koski was at the foot of the stairs and looked up and saw Palmer's feet starting to come down the ladder and then Palmer fell (R. 45, Koski Dep. p. 10). Wood had just stepped out of the doorway onto the main deck when he heard the fall (R. 47, St. 356).

As the result of the fall, Palmer sustained multiple skull fractures and severe brain damage which affected his mental faculties. The injuries were such that Palmer became an inmate of a mental institution and could not testify. The action was brought by his guardian *ad litem*, Jean M. Palmer, his wife.

THE MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS REACHED

This case was tried before a jury in the Superior Court of the State of Washington for King County, a court of original jurisdiction. It was petitioner's position throughout the trial, that when Palmer was found on the vessel in a helpless condition and unable to look out for his own safety, even though the helplessness was caused by intoxication, the vessel and the other crew members owed Palmer the duty to use reasonable care to assist Palmer to his quarters or to a place of safety where he would not be harmed by reason of his inability to protect himself. This obligation was due Palmer because he was a seaman and engaged in maritime employment. Under this theory, when Wood and Koski attempted to assist Palmer to his quarters, they were acting in the course of their employment for the vessel, and not as volunteers. The only question to be determined by the jury was whether Wood and Koski used due care under the circumstances in leaving Palmer in his condition at the top of the stairway.

Petitioner requested the trial court to charge the jury that there was a duty on the part of the officers and crew of the SS "JOHN B. WATERMAN" to exercise reasonable care to assist a fellow crew member who was on board and in a helpless condition by reason of intoxication. The trial court refused the proposed charge to which the petitioner excepted[6] (R. 34-35).

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[6] Plaintiff excepts to the failure of the court to give its proposed Instruction No. 17 (St. of Facts 432, L. 18 through L. 6, page 433): "I instruct you that under the law and facts in this case there is a duty on the part of the officers and crew of the SS 'JOHN B. WATERMAN' to exercise reasonable care to escort and assist a fellow crew member of that

The trial court charged the jury that the vessel was not liable for the acts of Koski and Wood in rendering assistance to Palmer unless they found that there was on board the SS "JOHN B. WATERMAN" a practice or custom which was invariably followed, and which was known or should have been known to the master of the vessel and which was for the benefit of the defendant for members of the crew to assist other members who were helpless by reason of intoxication. Petitioner excepted to the giving of this instruction upon the ground that such duty existed as a matter of law and should not have been submitted to the jury as a question of fact[7] (R. 32).

The jury's verdict was found in favor of the respondent upon which a judgment was duly entered. Peti-

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[6] (Continued)
vessel who was on board and in a helpless condition by reason of intoxication. I further instruct you that in determining whether or not a seaman was in such condition as to rpquire the assistance to which I have heretofore referred, you shall consider his condition with relation to the circumstances existing around said seaman and the place where he was found, at the time he was observed by the officers or men, in such condition." on the ground and for the reason that this is another instruction wherein we propose that there is a duty as a matter of law to care for the plaintiff under the circumstances as the jury may find in his case (Appendix E, p. 25).

[7] Plaintiff excepts to the court's giving of Instruction No. 11 (St. of Facts 421, Line 28 through Line 6, P. 423), where the court makes it as an issue whether or not a custom or practice to care for helpless seaman exists, which instruction reads as follows: "I instruct you that defendant is not liable for the acts of Frank Koski and Donald Wood in rendering assistance to plaintiff unless you find that there was on board the SS 'JOHN B. WATERMAN' a practice or custom which was invariably followed, and which was known to, or which should have been known, in the exercise of reasonable care, to the master of the ship owned by the defendant, and which was for the benefit of defendant in the service of the ship, for members of the crew to assist other members of the crew who are helpless by reason of intoxication." on the ground and for the reason stated in my motion to direct the jury to find such custom and practice as a matter of law and does not apply to maritime law (Appendix F, p. 26).

tioner appealed to the Supreme Court of the State of Washington which affirmed the judgment of the lower court, the Supreme Court's opinion being filed July 17, 1958 (Appendix B, p. 17) holding that there was no duty as a matter of law to assist Palmer and that the existence of such duty was properly submitted to the jury as a question of fact.

Petition for rehearing of the State Supreme Court's opinion was denied on December 10, 1958 (Appendix C, p. 22).

REASONS FOR ALLOWANCE OF THE WRIT

1. The Supreme Court of the State of Washington has decided a Federal question of substance, namely, the nature of the obligation of a ship owner employer to a seaman who is ill and helpless by reason of intoxication, not heretofore determined by this court and probably not in accord with applicable decisions of this court.

2. The question involves the nature of the obligation of a vessel owner to a sick seaman under the maritime law. The Supreme Court of the State of Washington held that if the seaman's illness is due to intoxication, then the obligation to care for the seaman which ordinarily applies in case of illness, does not apply as a matter of law. Such obligation can only be established by proving that a custom to care for the seaman existed on the particular vessel involved.

The effect of this decision is to make a distinction depending upon the cause of the illness which creates the seaman's helpless condition. If the illness was caused by intoxication, then the seaman does not have the

rights he would have if the illness was caused by an epileptic fit, a stroke, a heart attack, or other condition.

ARGUMENT IN SUPPORT OF WRIT

There Is a Duty, as a Matter of Law, to Assist a Helpless Seaman Found on the Deck of a Vessel, to a Place of Safety, Even Though His Helpless Condition Was Caused by Intoxication

It is the position of the petitioner, that intoxication so extreme that it results in physical helplessness and inability to protect one's self is equivalent to illness. This physical condition following intoxication is the same as far as the seaman's legal rights are concerned if the helplessness was caused by a heart attack, an epileptic seizure, or a stroke which leaves the seaman in such a condition that he cannot care for himself. Such physical condition places a duty as a matter of law upon the vessel employer to care for the seaman. The nature and extent of the duty depends upon the illness and the surrounding circumstances.

The relationship of a seaman to a vessel is the basis of the obligation of the vessel owner to care for the seaman when the circumstances require it. The classic statement that seamen are wards of the Admiralty has been likened to the obligation due from parents to children.[8]

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[8] *Robertson v. Baldwin* (1896) 165 U.S. 287, 41 L.Ed. 715, 719: "Indeed, seamen are treated by Congress, as well as by the Parliament of Great Britain, as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians: 'Quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares. The ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly." '(As a father toward his sons, as a teacher toward his students, a master toward his servants or those of the household.)

The fact that the physical condition which required the application of this duty arose because of the seaman's own fault has never been recognized as a defense or an excuse for the failure to supply this duty.[9] The trial court in the instant case recognized that intoxication was not a defense by instructing the jury that prior misconduct on the part of Palmer in arriving at this condition may not be used as a defense to the action or in mitigation of damages[10] (R. 32-33).

This was entirely consistent with the petitioner's po-

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[9] In *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 1933 A.M.C. 9, Judge Cardozo poses the question: "Let us suppose the case of a seaman slightly wounded through his own fault, but suffering grievous hurt thereafter as a consequence of septic poisoning brought about by lack of treatment." (1933 A.M.C. 11)

Judge Cardozo then continues that in such a case liability would nevertheless exist on the part of the shipowner. We quote further (p. 14): "The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This court has said that 'the ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly.' *Robertson v. Baldwin*, 165 U.S. 275, 287. Another court said: 'The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited.' *Scarff v. Metcalf*, 107 N.Y. 211, 215. Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection. There is doubt, and that substantial, whether the administrator of a railroad engineer who by misadventure has fallen from his locomotive while the train is on a bridge has a cause of action under the Federal Employers' Liability Act because of the failure of the crew of the train to come to the rescue of their comrade. *Harris v. Penn. R. R. Co.*, 1931 A.M.C. 1303, 50 F.(2d) 866, 868. There is little doubt that rescue is a duty when a sailor falls into the sea, *United States v. Knowles*, 4 Sawy. 517, and that a liability to respond in damages is cast upon the shipowners if he is abandoned to his fate. *Harris v. Penn. R. R. Co., supra.*"

[10] Court's Instruction No. 12: " * * * I further instruct you that any prior misconduct on the part of the seaman in arriving at such a helpless or disabled condition may not be used by the shipowner as a defense to an action brought for his failure to exercise reasonable care or in mitigation of any damage caused by his failure to exercise reasonable care" (Appendix G, p. 27).

sition that the duty to supply extra care does not exist unless the jury must first find that Palmer was helpless. The trial court defined the term "helpless" to the jury as the inability of the crew member to care for his own safety aboard a vessel in view of the conditions existing on board at that time[11] (R. 35-A).

The trial court also cautioned the jury that gross intoxication alone was not enough to require care by the defendant but that Palmer must have been reduced to helplessness[12] (R. 33).

It is thus apparent that the term "helpless" as defined by the court and considered by the jury refers to a physical condition that made it impossible for Palmer to care for his own safety. Such physical condition of the seaman has long been recognized by the Federal courts as creating a corresponding obligation on the part of the vessel to use reasonable care to prevent further harm to the seaman because of this condition. These courts have allowed recovery of damages to a seaman suffering delirium tremens from severe intoxication ashore, who fell down a hatch having escaped while momentarily unguarded;[13] allowed damages to the depend-

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[11] Court's Instruction No. 14: "I instruct you that the term 'helpless,' as used in these instructions, refers, in the normal meaning of the word, to the inability of a member of the crew to care for his own safety on board a vessel in view of the conditions existing on board said vessel at that time." (Appendix I, p. 27).

[12] Court's Instruction No. 13: "You must find for defendant unless you find that plaintiff was helpless at the time Frank Koski and Donald Wood terminated their assistance to plaintiff. Even if plaintiff was intoxicated or grossly intoxicated at such time, you must find for defendant unless you find that at such time plaintiff had been reduced to helplessness." (Appendix H, p. 27).

[13] *Reck v. Pac. Atl. S. S. Co.* (CCA 2) 180 F.(2d) 886, 1950 A.M.C. 744.

ents of an insane seaman who jumped overboard and was drowned when not restrained;[14] allowed damages for the failure to search the room or the belongings of a mentally deranged seaman who committed suicide by cutting his throat with a razor.[15]

The duty to supply maintenance and cure to a seaman stems from this same obligation. It must be borne in mind, however, that maintenance and cure, is but a *measure* of that duty. Circumstances may exist which would require more than simply making maintenance and cure available. For example, these benefits must not simply be made available but reasonable steps must be taken to assure that the seaman receives such benefits.[16-17]

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[14] *Bracher v. Union Dredging Co.* (CCA 9) 104 F.(2d) 762, 1939 A.M.C. 944.

[15] *Tetterton v. Arctic Tankers* (D.C. Pa.) 116 F.Supp. 429, 1954 A.M.C. 397.

[16] *Murphy v. American Barge Line* (CCA 3) 169 F.(2d) 61, 1949 A.M.C. 158. The seaman fell ill requiring hospitalization. He was put ashore with a pass admitting him to the hospital, 200 miles to 300 miles distant, but the vessel made no arrangements to get him to the hospital, or supply him with necessary funds. The court held that the vessel should have taken affirmative steps and supply the means for the plaintiff to get to the hospital, "It is worthwhile reminding ourselves of the orthodox rule that seamen are wards of the admiralty. The employer also occupies a position of guardianship, at least in the instance where the injury occurred on board the ship and he was aware of it before the seaman left the ship. *Cortes v. Baltimore Insular Line* (1932) 287 U.S. 367, 374-377. The record shows that this libelant was in his fifties; had a family of five children; had been discharged from his job in December and a month later was, on the evidence presented for him, in very considerable physical distress. It is to be remembered that this duty of maintenance and cure is an affirmative one. Affirmative obligations in the law are comparatively few and are confined, for the most part, to relationships among a family unit. But this duty on the part of the master to care for the seaman is one of the oldest and most conspicuous in the law of affirmative obligations."

[17] *Spellman v. American Barge Line* (CCA 3) 176 F.(2d) 716, 1954

Where the seaman is found upon the ship in a helpless condition a duty then exists on the part of the vessel employer to take such steps as are reasonably necessary under the circumstances to see that the sick crew member is taken to a place of safety. If, however, the seaman suffering illness *is found ashore,* then a duty may, or may not, exist according to the custom or practice, and proof of custom or practice is essential.[18-19]

The Supreme Court of the State of Washington holds that if intoxication is the cause of the incapacitating illness of the seaman on the vessel, proof of custom or practice to assist the seaman must be found. This rule substantially limits the rights of seamen. To require the seaman to prove that a custom or practice existed on the particular vessel when the illness was caused by intoxication, restricts traditional rights of the seaman which the courts have recognized are essential to encourage and maintain the calling of merchant seamen.

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[17] (Continued)
A.M.C. 724. In this case the seaman manifested symptoms of mental disorder on the vessel. The master put her off the vessel, supplied her with a bus ticket and some money, and two members of the crew put her on the bus at Evansville, Indiana, for Louisville, where there was a Marine Hospital. She disappeared, was found two days later in a dazed condition in her home town, disheveled, bruises on her body, in a catatonic shock. Her guardian brought an action for damages. In reversing the case because of error in the trial court's instruction, the Circuit Court stated (p. 719): "Merely furnishing means of transportation without making sure that they are employed by a mentally ill seaman may not amount to affording a method of transportation at all. Giving a bus ticket to a person who is mentally ill is hardly a method of affording safe transportation. What the captain of The Bruce did must be found by the jury to have been inadequate or insufficient in the execution of his duty in the light of the circumstances in the case."

[18] *Buckeye S. S. Co. v. McDonough* (D.C. Ohio) 103 F.Supp. 473, 1951 A.M.C. 2042, aff'd 1953 A.M.C. 343 (CCA 6).

[19] *Robinson v. Northeastern S. S. Co.* (CCA 2) 228 F.(2d) 679, 1956 A.M.C. 289.

We respectfully urge that it makes no difference what causes the helpless condition. If the seaman is helpless, then a duty arises as a matter of law to care for him.

It is respectfully urged that the Writ be granted.

Respectfully submitted,

SAM L. LEVINSON
EDWIN J. FRIEDMAN
Attorneys for Petitioner.

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

JOHN C. PALMER by JEAN M. PALMER, his guardian ad litem, *Plaintiff*,

vs.

WATERMAN STEAMSHIP CORPORATION, a corporation, *Defendant*.

No. 488932

JUDGMENT

THIS CAUSE came regularly on for trial upon the merits before the undersigned judge of the above entitled court, sitting with a jury, the plaintiff appearing by Jean M. Palmer, his guardian ad litem, and by his attorneys Levinson and Friedman, and the defendant appearing by its attorneys Graham, James & Rolph and Riddell, Riddell & Williams, and both sides having announced themselves ready for trial, and the jury having been duly impaneled and sworn, and the plaintiff having introduced testimony and rested, and defendant having introduced testimony and rested, and the court having instructed the jury, and the cause having been argued to the jury by counsel, and the jury having retired to consider its verdict and having returned a verdict in favor of defendant and against the plaintiff,

NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiff, and the various amended complaints of the plaintiff, be, and the same are hereby, dismissed with prejudice, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that de-

fendant have and recover of and from the plaintiff its statutory costs and disbursements herein to be taxed.

DONE IN OPEN COURT this 7th day of May, 1957.

GEORGE H. REVELLE
Judge

Presented by:
DONALD S. VOORHEES
of Riddell, Riddell & Williams
Attorneys for defendant
Waterman Steamship Corporation. (R. 18-19).

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN C. PALMER by JEAN M. PALMER, his Guardian ad Litem, *Appellant*,
vs.
WATERMAN STEAMSHIP CORPORATION, a corporation, *Respondent*.
No. 34383

OPINION

Department One, July 17, 1958

Appeal from a judgment of the Superior Court for King County, No. 488932, Revelle, J., entered May 7, 1957, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries. Affirmed.

The plaintiff was a seaman on defendant's ship. He was observed on the deck of the vessel in an intoxicated condition about three o'clock a.m., on August 22, 1955, by two crew members. They proceeded to help him toward his quarters by each taking an arm and walking him along the deck. When they reached the after deckhouse, one man preceded and one man followed plaintiff along a passageway to the top of the ladder leading down to the crew's quarters. One man left him, at this point, and the other left after plaintiff had taken a couple of steps down the ladder. A few seconds later, the plaintiff fell down the ladder and was severely injured.

The plaintiff sued by his guardian ad litem for the injuries received. From a judgment in favor of defendant, plaintiff appeals.

The appellant assigns error (1) to the court's refusal to give two requested instructions, which would have imposed a duty, as a matter of law, on the shipowner to care for a seaman in a helpless condition by reason of intoxication, and (2) in submitting to the jury the issue as to whether there was, in fact, such a duty on the part of the shipowner.

1. Appellant contends, in support of this assignment, that a shipowner has the duty to provide maintenance and cure for a sick or injured seaman; that intoxication constitutes a sickness which invokes that duty; and that this duty includes adequate measures to prevent him from being injured as a result of his intoxication.

We do not agree that the duty of maintenance and cure of sick and injured seamen includes the duty to prevent injury by reason of intoxication.

In the instant case, the appellant has received the maintenance and cure which a seaman is entitled to receive because of his injury. He needed no maintenance and cure for his intoxication prior to the injury. If there was any duty of care on the part of the shipowner prior to the injury, it must be based, therefore, not on the subsequent sickness or injury, but on the seaman's intoxication prior thereto. The question is as to the duty, if any, that a shipowner owes to an intoxicated seaman, not what is the nature of the duty of maintenance and cure that is owed to an injured seaman. The assignments are not well taken.

2. Appellant assigns as error the submission to the jury of the issue of whether or not there was an "invariable" custom under which the shipowner owed a

duty of care to an intoxicated seaman. The testimony on this point was conflicting and appellant now objects to the word "invariable" in the instruction. No such objection was made at the time the instruction was submitted to the jury. It cannot be raised later for the first time.

3. Appellant contends the trial court erred in admitting certain testimony of two witnesses as to his prior intoxication. This evidence was admitted for the purpose of affecting appellant's ability to earn money by holding a steady job. The evidence was properly admitted for that purpose, as it affected the amount of damages suffered from loss of wages.

4. Appellant contends the trial court erred in admitting the testimony of a witness as to the ability of intoxicated seamen generally to descend ladders on a ship. The trial court properly admitted this evidence for the limited purpose of tending to establish the standard of reasonable care, which was owed to appellant under the circumstances.

5. Appellant contends that respondent was guilty of prejudicial misconduct in arguing the morality of drinking to the jury. Appellant objected to this line of argument, and the objection was sustained. Appellant did not ask for a mistrial. The jury was instructed that prior misconduct of the appellant was no defense, and that it could not be used to mitigate damages if the jury found liability. It was not prejudicial error.

6. Appellant contends the respondent was guilty of prejudicial misconduct in bringing the fact before the jury that appellant's family was on California welfare

at the time of the trial. Respondent posed a long series of questions as to the welfare history of appellant and his family. This portion of the testimony was objected to as immaterial, and the objection was sustained. Appellant did not claim, at the time, that the question was prejudicial. He did not ask for a mistrial or for a curative instruction, or move to strike the testimony. Further, the testimony only went to the question of damages and could not be prejudicial, since the jury found there was no liability. Appellant contends this is the same as reference to insurance, and, as such, it could not be cured by an instruction. We do not agree.

7. Public assistance is available to dependent families with little or no earning power, and, thus, evidence relating to welfare prior to the accident was properly admitted as affecting the amount of wages lost as a result of the injury.

Appellant assigns error to the trial court's Instruction No. 20A, which reads:

> "Although there has been some testimony in this case as to the cost or value of nursing and medical services, I instruct you that such testimony is to be totally disregarded by you in computing plaintiff's damages, if you should find for the plaintiff, for the reason that plaintiff has made no claim in this action that he or his family will incur any expense for his care or treatment."

8. This case is before us on a short record, and this error was not included in the statement of points to be relied upon. Neither the court, in making its certificate, nor opposing counsel, who had the right to propose amendments to the statement of facts, had an opportu-

nity to pass upon the sufficiency of the record with regard to this assignment of error. It, therefore, cannot be considered upon appeal.

9. Appellant contends that under Rule of Pleading, Practice and Procedure 19, 34A Wn.(2d) 81, as amended, effective November 1, 1955, his motion for summary judgment on the issue of liability, made before trial, should have been granted.

We hold that the motion was properly denied, since there were issues of fact as to the extent of appellant's intoxication, the degree of negligence, if any, exercised toward him, and the existence of respondent's duty of care. This is, therefore, not a case of liability, as a matter of law, and it was properly submitted to the jury.

The judgment is affirmed.

HILL, C. J., FINLEY, HUNTER, and FOSTER, J. J., concur.

(R. 20-24)

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN C. PALMER by JEAN M. PALMER, his guardian ad litem, *Petitioner*, vs. WATERMAN STEAMSHIP CORPORATION, a corporation, *Respondent*.	No. 34383 Filed December 10, 1958

ORDER DENYING PETITION FOR REHEARING

The court having considered the appellant's position for a rehearing herein, the respondent's answer to the petition, and the appellant's reply to the respondent's answer; and a majority of the court having determined that the petition should be denied,

IT IS ORDERED that the petition for a rehearing be and it is hereby denied.

Dated this 10th day of December, 1958.

By the court:

MATTHEW W. HILL
Chief Justice

(R. 31)

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN C. PALMER by JEAN M. PALMER, his guardian ad litem, *Petitioner*, vs. WATERMAN STEAMSHIP CORPORATION, a corporation, *Respondent*, and STANLEY STEAMSHIP CORPORATION, a corporation, *Defendant*.	No. 34383

JUDGMENT

Filed December 10, 1958; King County No. 488932

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now, on this 10th day of December, A.D. 1958, on motion of Riddell, Riddell and Williams, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said Waterman Steamship Corporation, a corporation, have and recover of and from the said John C. Palmer, by Jean M. Palmer, his Guardian ad Litem, and from American Bonding Company of Baltimore, surety to the extent of $300.00, the costs of this action taxed and allowed at One Thousand, Two Hundred Fifty-four and 80/100 ($1,254.80) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the

said Superior Court for further proceedings, in accordance herewith.

Judgment of Record in the Office of the Clerk of the Supreme Court in Journal 43 at page 145. (R. 48)

APPENDIX E

PLAINTIFF'S EXCEPTION TO TRIAL COURT'S FAILURE TO GIVE PROPOSED INSTRUCTION No. 17

Plaintiff excepts to the failure of the court to give its proposed Instruction No. 17, reading as follows:

> "I instruct you that under the law and facts in this case there is a duty on the part of the officers and crew of the SS "JOHN B. WATERMAN" to exercise reasonable care to escort and assist a fellow crew member of that vessel who was on board and in a helpless condition by reason of intoxication.
>
> "I further instruct you that in determining whether or not a seaman was in such condition as to require the assistance to which I have heretofore referred, you shall consider his condition with relation to the circumstances existing around said seaman and the place where he was found, at the time he was observed by the officers or men, in such condition."

on the ground and for the reason that this is another instruction wherein we propose that there is a duty as a matter of law to care for the plaintiff under the circumstances as the jury may find in this case (R. 34-35).

APPENDIX F

PLAINTIFF'S EXCEPTION TO THE TRIAL COURT'S INSTRUCTION NO. 11 THAT THE DUTY TO ASSIST PALMER WAS A QUESTION OF FACT

Plaintiff excepts to the court's giving of Instruction No. 11, the court's Instruction No. 11, where the court makes it as an issue whether or not a custom or practice to care for helpless seamen exists, which instruction reads as follows:

> "I instruct you that defendant is not liable for the acts of Frank Koski and Donald Wood in rendering assistance to plaintiff unless you find that there was on board the SS "JOHN B. WATERMAN" a practice or custom which was invariably followed, and which was known to, or which should have been known, in the exercise of reasonable care, to the master of the ship owned by the defendant, and which was for the benefit of defendant in the service of the ship, for members of the crew to assist other members of the crew who are helpless by reason of intoxication."

on the ground and for the reason stated in my motion to direct the jury to find such custom and practice as a matter of law and does not apply to maritime law (R. 32).

APPENDIX G

COURT'S INSTRUCTION No. 12

"I instruct you that, where a vessel owner in pursuance of his obligation, if any, to care for an intoxicated or disabled seaman undertakes the care and safety of such a seaman with knowledge of the helpless condition of such a seaman, he must exercise reasonable care in the performance of said obligation or duty. I further instruct you that any prior misconduct on the part of the seaman in arriving at such a helpless or disabled condition may not be used by the shipowner as a defense to an action brought for his failure to exercise reasonable care or in mitigation of any damage caused by his failure to exercise reasonable care" (R. 32-33).

APPENDIX H

COURT'S INSTRUCTION No. 13

"You must find for defendant unless you find that plaintiff was helpless at the time Frank Koski and Donald Wood terminated their assistance to plaintiff. Even if plaintiff was intoxicated or grossly intoxicated at such time you must find for defendant unless you find that at such time plaintiff had been reduced to helplessness" (R. 33).

APPENDIX I

COURT'S INSTRUCTION No. 14

"I instruct you that the term 'helpless,' as used in these instructions, refers, in the normal meaning of the word, to the inability of a member of the crew to care for his own safety on board a vessel in view of the conditions existing on board said vessel at th[illegible]t time" (R. 35-A).